IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 813 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE A.N.DIVECHA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? No

2. To be referred to the Reporter or not? No

J

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge?No

RAIJIBHAI SANKALBHAI

Versus

STATE OF GUJ

Appearance:

Shri J.C.Sheth, Advocate, for the Appellant - Accused.

Shri K.P.Rawal, Additional Public Prosecutor, for the Respondent - State.

CORAM : MR.JUSTICE A.N.DIVECHA

Date of decision: 11/12/96

ORAL JUDGEMENT

The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge of Panchmahals at Godhra on 9th October 1987 is under challenge in this appeal under Section 374 of the Code of Criminal Procedure, 1973 (the Cr.PC for brief). Thereby the learned trial Judge has convicted the appellant accused of the offences punishable under Sections 363, 366 and 376 of the Indian Penal Code, 1860 (the IPC for brief) and sentenced him to rigorous imprisonment for six months and fine of Rs.500/- in default rigorous imprisonment for three months for each ofthe offences punishable under Sections 363 and 366 of the IPC and rigorous imprisonment for two years and fine of Rs.1000/in default rigorous imprisonment for six months for the offence punishable under Section 376 thereof.

2. The facts giving rise to this appeal move in a narrow compass. It is the case of the prosecution that the complainant, his wife and his minor daughter, named, Kapilaben, were working in road -laying work on 7th May 1986. At about 5.30 p.m., the appellant - accused in the company of his sister, named, Gangaben, forcibly carried Kapilaben in his house and had forcible intercourse with her. Later on, he took her away to different places and they were ultimately traced at village Machhia-na-Muwada and were brought to their village Vania. In the meantime, her father had filed his complaint of the incident with the police on 7th May 1986. That set the investigation machinery into motion. That resulted in apprehending the appellant - accused and his sister Gangaben as also minor girl Kapilaben. On completion of the investigation, the necessary chargesheet was filed in the Court of the Judicial Magistrate (First Class) at Lunawada. Since the case was exclusively triable by the Court of Sessions, the learned trial Magistrate committed the case to the Sessions Court of Panchmahals at Godhra for trial and disposal. It came to be registered as Sessions Case No.18 of 1987. It appears to have been assigned to the learned Additional Sessions Judge at Godhra for trial and disposal. In the chargesheet two persons were named as accused. One of them was the appellant herein and another was his sister by the name of Gangaben. The charge against the accused was framed on 3rd August 1987 at Exh.1 on the record of the case. Neither accused pleaded guilty to the charge. Thereupon, they were tried. After recording the prosecution evidence and after recording the further statement of each accused under Section 313 of the Cr.PC and after hearing arguments, by his judgment and order passed on 9th October 1987 in Sessions Case No.18 of 1987, the learned Additional Sessions Judge at Godhra convicted the

appellant (accused No.1) of the offences punishable under Sections 363, 366 and 376 of the IPC and sentenced him to rigorous imprisonment for six months and fine of Rs.500/in default rigorous imprisonment for three months for each of the offences punishable under Sections 363 and 366 of the IPC and rigorous imprisonment for two years and fine of Rs.1000/- in default rigorous imprisonment for six months for the offence punishable under Section 376 thereof. Accused No.2 came to be acquitted by the learned trial Judge. The appellant herein was aggrieved by his conviction and sentence. He has therefore invoked the appellate jurisdiction of this court under Section 374 of the Cr.PC for questioning the correctness of his conviction and sentence as aforesaid.

3. Learned Advocate Shri J.C.Sheth for the appellant has taken me through the entire evidence on record in support of his submission that the learned trial Judge was in error in coming to the conclusion that the prosecution established its case against the appellant herein beyond any reasonable doubt. It has been urged by learned Advocate Shri Sheth for the appellant that, in view of the evidence on record, the learned trial Judge ought to have accepted the defence version and ought to have acquitted the appellant herein of the charge levelled against him. In any case, runs the submission of learned Advocate Shri Sheth for the appellant, the appellant has married the victim girl and they have been residing happily together, and as such the appellant deserves to be granted benefit of probation in this case. As against this, learned Additional Public Prosecutor Shri Rawal for the respondent - State has submitted that the learned trial Judge has recorded the finding of guilt against the appellant after careful examination and appreciation of the evidence on record, and as such the finding of guilt calls for no interference by this court in this appeal. Learned Additional Public Prosecutor Shri Rawal for the respondent - State has further urged that the learned trial Judge has leniently dealt with the appellant qua imposition of the sentence and, looking to the gravity of the offence, no probation deserves to be granted to the appellant in this case.

4. I think learned Advocate Shri J.C.Sheth for the appellant is right in his submission to the effect that the learned trial Judge was in error in convicting the appellant - accused for the offence punishable under Section 363 of the IPC. The complaint disclosed the offence, if any, punishable under Section 366 of the IPC and not under Section 363 thereof. According to the complaint, it was a case of abduction and not kidnapping

as defined in Section 361 of the IPC. There was no question of any enticing away of the minor girl within the meaning of Section 363 read with Section 361 thereof. On the contrary, the allegation against the present appellant was that he forcibly took the minor girl away from her house. It would at the most amount to abduction and not kidnapping. In that view of the matter, the appellant could not have been convicted of the offence punishable under Section 363 of the IPC.

5. I think the learned trial Judge has convicted the appellant of the offence punishable under Section 376 of the IPC mainly on the ground that he found the age of the minor girl to be below 16 years on the date of the incident. In support of his conclusion, the learned trial Judge has chosen to rely on her birthdate as recorded in her school record as 16th January 1971. A copy of the birth certificate given by the Headmaster of the school is at Exh.25 on the record of the case. The prosecution has also brought on record a copy of entry No.1 in the General Register of the school at Exh.34 and her School Leaving Certificate at Exh.35 on the record of the case. Her birth- date found noted in the school record is 16th January 1971. The incident has occurred on 7th May 1986. She would therefore be aged about 15 years 4 months on the date of the incident. The question however is how far the birth date of the girl in question noted in her school record is reliable.

6. It may be noted that the evidence on record clearly shows that there was a younger sister of the victim girl. Her birth date nowhere figures on the record. It transpires from the evidence of the complainant (the father of the girl in question) that he went to the primary school for admission of the victim girl by the name of Kapilaben. He was asked to produce some authentic record of her birth from the local authority. He has then stated in his evidence that he went to the Talati and ascertained the birth date of his daughter Kapilaben and thereafter went to the school for giving her birth date. He however appears not to have carried any record from the local authority showing her birth date. No attempt was made to produce the birth record of minor girl Kapilaben as noted in the birth register of the local authority in question. It cannot be gainsaid that parents often give incorrect birth dates while getting their children admitted to school. In this case, the complainant is the father of the minor girl in question. His evidence regarding the birth date given by him at the time of her admission to school would certainly be relevant. Ordinarily, it should have a

great probative value. However, his evidence in that regard is not free from doubt. As pointed out hereinabove, he has deposed to the effect that he was required to bring some authentic record of her birth date from the local authority. He appears to have contacted the Talati but he does not appear to have brought any authentic record from the birth register of the local authority. In that view of the matter, his evidence regarding her birth date cannot be accepted as a gospel truth, more particularly in the light of the other evidence on record.

7. The minor girl was subjected to medical examination by Dr. Hansaben inter alia with respect to ascertaining her age. In her oral testimony at Exh.15 on the record of the case, Dr. Hansaben has clearly opined that the girl in question was about 17 years of age at the time of her examination. It transpires from her testimony that the girl was examined on 2nd September 1986, about four months after the occurrence of the incident. Dr.Hansaben at Exh.15 has clearly admitted in her cross-examination that the ossification test (for ascertainment of age) would be subject to an error of two years on either side. It would mean that the girl in question could be of 19 years in age on the date of her examination about four months after the occurrence of the incident. In that view of the matter, she could be said to be above the age of 18 years on the date of the incident.

8. The declaration of the marriage between the appellant and the girl in question has come on record at Exh.11 in the proceeding. It transpires therefrom that the age of the girl was shown to be 19 years. It appears that she consented to her marriage and her consent has come on record at Exh.10 in the proceeding. The person who performed the marriage has also been examined at Exh.23 on the record of the case. He has clearly stated therein that he performed the marriage with voluntary consent of both the spouses. In view of these evidences on record, whether or not the girl was below the age of 16 years on the date of the incident is shrouded in mystery. In that view of the matter, there is no escape from the conclusion that the prosecution could not establish beyond any reasonable doubt that the girl in question was below the age of 16 years on the date of the incident.

9. The appellant has admitted sexual intercourse with her in his further statement under Section 313 of the Cr.PC. His case was that it was done by consent.

That was the line of cross-examination of the girl at Exh.19. It appears that at the relevant time she was under the influence of her father and she appears to have given her oral testimony as desired by him. Her father has been examined at Exh.36 on the record of the case. The line of cross-examination in para 11 thereof is quite eloquent in that regard. That probabalises the defence version that the girl gave evidence against the appellant presumably at the instance of the complainant under the influence of the police people. In that view of the matter, it becomes doubtful whether or not she did not consent to sexual intercourse.

10. Besides, her initial version that she was subjected to sexual intercourse against her will soon after occurrence of the incident is not borne out from her police statement. It transpires from the material on evidence that her police statement was silent on that point. That would again go to show that she might have acted at the behest of her father and the police people while giving her deposition.

11. The cross-examination of Kapilaben at Exh.19 and her father at Exh.36 would go to show that the case of abduction is found to be quite incredible and unreliable in view of material contradictions found in their police statements. It would be difficult to rely on their oral testimony for fastening the criminal liability under Section 366 of the IPC on the appellant.

12. It transpires from the defence version as found in the line of cross-examination of Kapilaben at Exh.19 and her father at Exh.36 and in the further statement of the appellant under Section 313 of the Cr.PC that the girl wanted to marry the appellant and the father was against this marriage on the ground that her elder sister was married to the brother of the appellant and she was not very happy in her matrimonial home and he wanted her to be married to someone else which was not liked by her. According to the defence version, she therefore went to reside in the house of the appellant and thereafter they married and lived as husband and wife. In view of the evidence on record, the defence version is found probabalised. In that view of the matter, the learned trial Judge ought not to have convicted the appellant of the offences with which he was charged or any of them.

13. In view of my aforesaid discussion, I am of the opinion that this appeal deserves to be accepted. The impugned judgment and order of conviction and sentence passed by the learned trial Judge deserves to be quashed

and set aside.

14. In the result, this appeal is accepted. The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge at Godhra on 9th October 1987 in Sessions Case No.18 of 1987 is quashed and set aside. The bail bonds furnished by the appellant are cancelled.

@@@@@@@@@@@@